



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.26 OF 2016

NICHOLAS MAINA MUKUNDI.....CLAIMANT

VERSUS

OTHAYA BOYS HIGH SCHOOL.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 12th May, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 10.02.2016 in person. The claimant prayed for judgment against the respondent for:

- a) Lost salary of Kshs.2, 468, 556.00 as computed in paragraph 24(a) of the memorandum of claim.
- b) Salary arrears from the months of April to November 2015 Kshs.32, 152 as indicated in the letter of dismissal.
- c) December 2015 salary as per the letter of dismissal being Kshs.10, 827.00.
- d) 3 months' pay in lieu of termination notice Kshs.32, 481.00.
- e) Accrued unpaid off days as computed at paragraph 24(e) Kshs.69, 167.00.
- f) Accrued unpaid annual leaves as computed at paragraph 24(f) Kshs.28, 104.00.
- g) Accrued public holidays as computed at paragraph 24(g) Kshs.14, 324.00.
- h) Service pay for each of 5 years of service at Kshs.10, 827 per year making Kshs.54, 135.00.
- i) Unpaid overtime.
- j) Costs of this suit and interest.
- k) Any other relief that the honourable court may deem fit to grant in the interest of justice.

The respondent filed the memorandum of response on 22.03.2016 through Wachira Nderitu & Company Advocates. The respondent prayed that the respondent's suit is dismissed with costs to the respondent.

The respondent employed the claimant as a cook effective 01.09.2010. The claimant served until

06.04.2015 when he was arrested on account of alleged crimes involving giving to the school watchman, one John Ngatia Nderitu, food items being the property of the respondent and including some dry maize seeds, beans, milk, and sugar. In that regard, the claimant and the co-accused persons being one John Maina Gikonyo and John Ngatia Nderitu were prosecuted in Criminal Case No. 167 of 2015 in the Senior Resident Magistrate's Court at Othaya. The claimant was the 3rd accused person in the criminal proceedings and the trial court acquitted him under section 215 of the Criminal Procedure Code for the alleged offence of stealing by servant contrary to section 281 of the Penal Code and other alternative counts in the proceedings.

After the acquittal the claimant reported to the respondent's principal to resume duty but the principal told him that he stood suspended from work on half pay pending determination of his fate by the respondent's board. The claimant was summoned to the school on 08.01.2016 and was given the dismissal letter of 31.12.2016 (erroneously dated as such because as per evidence the correct date would be 31.12.2015)

By that letter dated 31.12.2016(essentially 31.12.2015), the respondent terminated the claimant's employment on account of gross misconduct and effective 01.01.2016. The claimant's terminal dues were computed in the letter to include 3 months' salary in lieu of termination notice Kshs. 32, 481.00; salary arrears from April to November 2015 Kshs. 32, 481.00; and December 2015 salary Kshs.10, 827.00. The letter stated that the relevant cheques in the sum of Kshs. 75, 460.00 had been enclosed in the letter accordingly.

The claimant replied to the termination letter by his letter of 20.01.2016. He stated that he doubted that the respondent's board had convened a meeting and resolved that his employment be terminated. He lamented that the rules of natural justice had been contravened as he had been dismissed without being heard. He stated that he had a clean record of service and had been acquitted of the criminal charges. He stated that he had a legitimate expectation to work until attainment of the mandatory age of retirement. It was his position that his employment could only be terminated upon justifiable and credible reasons. In view of the termination, he demanded adequate compensation for loss of employment. He gave a notice to sue upon lapsing of 7 days from the date of his reply.

It would appear that the claimant never received the cheques referred to in the termination letter because he disputed the computation of his terminal dues as was set out in the letter.

The parties agreed that the suit be determined on the basis of the pleadings, documents, affidavits and submissions on record. The court has considered the material on record. The only issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- 1) The respondent has already accepted to pay the sum of **Kshs. 75, 460.00** as per the termination letter and as per the ensuing court-directed negotiations and the respondent's submissions. The claims and prayers are allowed accordingly.
- 2) As evidence was not provided by the claimant for the claims on overtime, unpaid off days, and unpaid holidays. The same will be declined. The court has considered that throughout the service the claimant has not established that he had raised grievances about the claims and the evidence to justify the award as computed in the statement of claims has not been provided. Accordingly, the claims and prayers will fail.
- 3) For claims on annual leaves accrued and not taken or paid for, the claimant filed a leave application form dated 28.08.2012 showing he applied for 13 leave days from 13.08.2012 to 03.09.2012. The form shows that the leave was not approved (despite the period falling within school holidays as the court has taken judicial notice of the school calendar). The court finds that under section 28 of the Employment Act, 2007 the claimant was entitled to annual leave and the same was not accorded. The claimant is awarded **Kshs.28, 104.00** for annual leave as prayed for.
- 4) The claimant's employment was disrupted with the ensuing arrest and prosecution. Upon acquittal his employment was terminated without a notice and hearing as was provided in section

41 of the Employment Act, 2007. The employer gave no genuine reason for the termination as envisaged in section 43 of the Act as the termination letter alleged gross misconduct with empty particulars. The court returns that the termination was unfair for want of due process and a valid reason as envisaged in the cited sections. The claimant has at paragraph 25 of the claim stated that the termination was unlawful and the court finds as much. At paragraph 26 of the claim he stated that he wished and had expected to work up to retirement age. He then prayed for Kshs. 2, 468, 556.00 being lost pay had he served to age of 60 years, the mandatory retirement age. He also prayed for such other relief that would be in the interest of justice. The claimant desired to continue in employment. He did not contribute to his termination but the respondent has established that during employment the claimant received warnings about his service. To balance justice and in view of all circumstances of the case, the claimant is awarded 9 months' pay under section 49 (1) (c) of the Act for unfair termination making **Kshs.97, 443.00**. As the claimant will have an opportunity to rearrange his life and move on in gainful engagement, the prayer for pay up to age of 60 years is found unjustified and is declined.

5) The payslips on record showed that the claimant was a member of the NSSF and there being no justification or agreement on service pay, the same is declined in view of the provisions of section 35(5) and (6) of the Act.

6) The claimant is awarded costs of the suit fixed at **Kshs.30, 000.00**.

In conclusion judgment is hereby entered for the claimant against the respondent for:

a) The respondent to pay the claimant **Kshs.231, 007.00**.

b) The respondent to pay the claimant the sums in (a) above by **01.07.2017** failing interest to be payable thereon at court rates from the date of this judgment till full payment.

Signed, dated and delivered in court at **Nyeri** this **Friday, 12th May, 2017**.

BYRAM ONGAYA

JUDGE